

## **Interim Court Remedies in Support of Arbitration under Japanese Law**

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### **I. Introduction**

The January 1984 issue of the "International Bar News" says that one of future programmes of Committee D is "Pre-trial Attachments and other Interim Court Remedies in Aid of Arbitration" dealing with the laws of Spain, Japan, Holland, Scandinavia and Canada.<sup>1</sup>

This paper will focus "Interim Court Remedies in Support of Arbitration under The Japanese Law." The topic has never received much attention in Japanese legislation or case-law.

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<sup>1</sup> The International Bar News, January, 1984, p.12.

The Code of Civil Procedure does not provide for interim remedies in arbitration matters. However, Article 802 of the Code of Civil Procedure provides that execution in virtue of an award can only take place where the admissibility thereof has been pronounced by way of a judgment of execution. As claim in arbitration agreement is enforceable, the existence of an arbitration clause does not restrict the access to interim remedies such as expedited procedures, namely provisional attachment and provisional disposition which are available under the law of civil procedure.<sup>2</sup>

## II. Nature of Interim Remedies

### (a) The Jurisdiction of Courts to Order Interim Remedies

These expedited procedures, that is to say, provisional attachment and provisional disposition are available if the applicable requirements under the law of civil procedure are fulfilled.

Arbitration Tribunal can neither order a provisional attachment nor a provisional disposition. These measures are available only to the courts. They are the District Court or the Court having jurisdiction over the suit.<sup>3</sup>

### (b) Expedited Procedures and Arbitration Procedure

A civil Court does not deal under direction of an arbitration tribunal in the above-mentioned expedited procedures. Provisional attachment and provisional disposition are granted independently of the arbitration procedure.

The arbitrator is therefore, not entitled to request expedited procedure. This may only be done by the affected party.

The provisions of the Code of Civil Procedure Book VIII, entitled

<sup>2</sup> The Tokyo District Court, July 19, 1954, 5 *Kakyū Minji Saiban Reishū* (A Collection of Civil Cases in the Inferior Court) 110.

<sup>3</sup> Civil Procedure Law (hereinafter C.P.L.), Art. 739: The Court competent to order provisional attachment is the District Court in the district of which is situated the object against which provisional attachment is to be made, or the Court having jurisdiction over the suit.

C.P.L., Art. 757, para. 1: The Court competent to order provisional disposition is the Court having jurisdiction over the suit.

“Arbitration Procedure”, apply to domestic as well as to transnational arbitration.

(c) Parties

Either party to arbitration may seek an interim remedy from the court before the commencement or during the course of the arbitration proceedings whenever the conditions for the granting of such remedy exist.<sup>4</sup>

The decision on the motion for a provisional attachment or a provisional disposition is always directed against natural or legal persons. All interim remedies are only enforceable against the debtor.

The law provides several steps to protect the debtor.

In the order of provisional attachment the debtor may stay the carrying out of the provisional attachment, that in most cases results in a holding of his total assests, or to effect the annulment of the provisional attachment if already carried out, by providing the sum of money deposit determined by the court.<sup>5</sup>

A further protection of the debtors is objection against a ruling for provisional attachment. The debtor should show the grounds on which annulment or a modification of the provisional is applied for.<sup>6</sup> If objection is raised, the Court shall summon the parties to oral proceedings.<sup>7</sup>

In addition, a claim for damages is available under The Civil Code.<sup>8</sup>

(d) Third Parties

The rights and interests of third parties are not protected by the law because expedited procedures of the above-mentioned type against third parties are not available. There are no general rules to protect third parties

<sup>4</sup> C.P.L., Art. 737: The Supreme Court, September 29, 1964, 7 *Saikō Saibansho Minji Hanrei Shū* (A Collection of Civil Supreme Court Cases) 1541 ;C.P.L. Arts. 755, 760.

<sup>5</sup> C.P.L., Art. 743.

<sup>6</sup> C.P.L., Art. 744.

<sup>7</sup> C.P.L., Art. 745.

<sup>8</sup> The Civil Code of Japan Art. 709: A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.

being affected by an interim order.<sup>9</sup>

### III. Two Types of Interim Remedies

Under Book VI of The Code of Civil Procedures provides that the Court can order Provisional Attachment or Provisional Disposition. The Concept of Contempt of Court under the Anglo-American law does not exist in Japanese Law.

#### A. Provisional Attachment

The motion for the provisional attachment shall contain:

- (1) Designation of the claim and
- (2) A statement of the facts which form the grounds for the provisional attachment.<sup>10</sup>

The grounds for such an attachment give reason to assume that the later execution award is endangered. The reason is founded, for instance, in a situation where the debtor transfers assets by taking them out of the reach of the creditor in order to avoid later execution.

Provisional attachment may take place for the purpose of securing execution against a movable or an immovable in respect of a money claim or in respect of a claim which can be converted into a money claim.<sup>11</sup>

The Court may direct provisional attachment where it is to be apprehended that, failing such measure, execution of the judgment would be impossible or that material difficulty in the execution thereof would be caused, in particular, if the judgment would have to be executed abroad.<sup>12</sup>

The decision on the motion for provisional attachment can be rendered without prior oral proceedings.<sup>13</sup>

<sup>9</sup> C.P.L. Art. 755: The Supreme Court, June 8, 1962, 16 *Saikō Saibansho Minji Hanreishū* 1283.

<sup>10</sup> C.P.L., Art. 740, par. 1.

<sup>11</sup> C.P.L., Art. 737.

<sup>12</sup> C.P.L., Art. 738.

<sup>13</sup> C.P.L., Art. 741, par. 1.

The Court may make the order to provisional attachment dependent on security which the creditor furnishes as the Court may fix.<sup>14</sup>

If there are doubts about the existence of a valid claim for payment or the reason for provisional attachment, an oral hearing is usually set to enable the debtor to be heard. The debtor has the opportunity during this oral proceedings to show that the claim for payment would not exist or that there is no reason to fear an avoidance of execution.

If oral proceedings take place, the decision on the motion for a provisional attachment ensues by means of a final judgment, in the contrary case, by means of a ruling.<sup>15</sup>

If the arbitration procedure is not pending when the attachment is ordered, the Court of provisional attachment shall, upon application by the debtor, order that the creditor is to institute his action within a certain period of time.<sup>16</sup> Should the order to instigate action be disregarded, the provisional attachment shall, upon the application, of the debtor, be annulled by a final judgment.<sup>17</sup>

#### B. Provisional Disposition

Provisional dispositions are admissible in respect of the subject matter of the arbitration, if it is to be apprehended that by reason of a change in the existing situation the realization of the right appertaining to a party would be impossible or that material difficulty in the realization thereof would be produced.<sup>18</sup>

The provisions relating to orders and procedure for provisional attachment apply *mutatis mutandis* to orders and procedure for provisional disposition.<sup>19</sup>

The Court in the exercise of its discretion determines what dispositions are requisite for attaining the object of the application.<sup>20</sup> The provisional

<sup>14</sup> C.P.L., Art. 741, par. 2; Art. 743.

<sup>15</sup> C.P.L., Art. 742, par. 1

<sup>16</sup> C.P.L., Art. 746, par. 1.

<sup>17</sup> C.P.L., Art. 746, par. 2

<sup>18</sup> C.P.L., Art. 755.

<sup>19</sup> C.P.L., Art. 756.

<sup>20</sup> C.P.L., Art. 758, par. 1. It is not possible to appoint receiver to manage an enterprise except where this is expressly provided for by bankruptcy or re-organisation laws.

disposition is basically solely for the purpose of securing an individual claim for arbitration procedures. It may not be used to satisfy a claim in respect of the subject matter of the arbitration.

The appointment of a sequestrator by the court is foreseen by the Japanese Law of Civil Procedure.<sup>21</sup> A further security steps can only by means of a provisional disposition whereby the court directs an adversary to do, or to refrain from doing, an act, or to render a performance.

Provisional dispositions are also admissible for the purpose provisionally settling the state of affairs with regard to relations of the subject matter of the arbitration.<sup>22</sup> The provisional disposition is solely for the purpose of regulating an interim situation. It may not be used to create new relations in respect of the subject matter of the arbitration.

#### IV. Conclusion

Parties to an arbitration may seek from the Japanese courts interim remedies such as provisional attachment or provisional disposition which are available under the law of civil procedure. Such interim court remedies usually serve to support arbitration.

<sup>21</sup> C.P.L., Art. 758, par. 2.

<sup>22</sup> C.P.L., Art. 760.